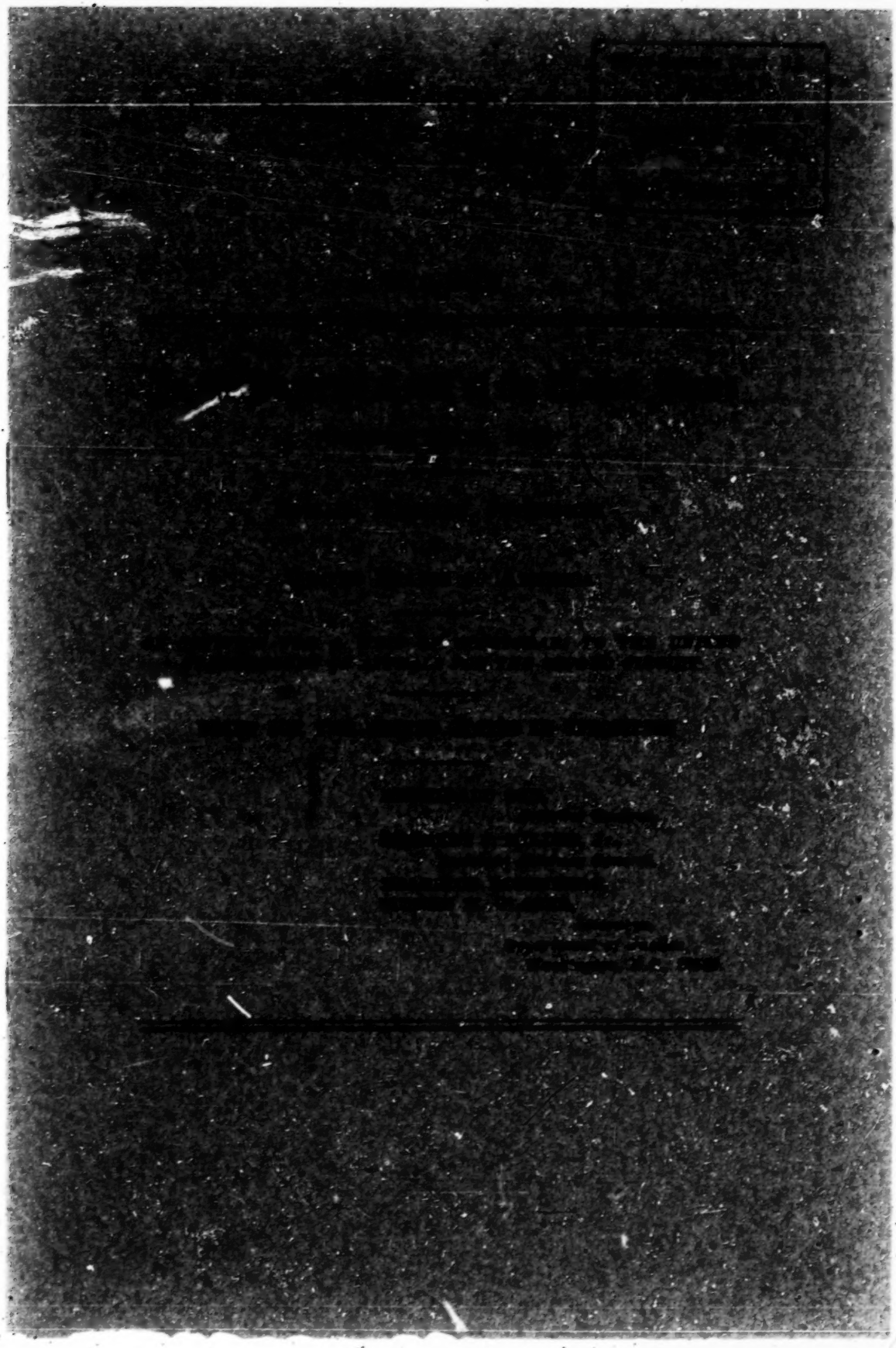

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 289

EDWARD MISHKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 317 F. 2d 634.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on May 20, 1963. A petition for rehearing was denied on June 19, 1963. The petition for a writ of certiorari was filed on July 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for conspiracy to violate the obscenity laws rests upon inadmissible hearsay evidence.

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2. Whether the evidence was sufficient to prove that petitioner had knowledge of the obscene character of the books involved.

3. Whether the trial court abused its discretion in permitting the jury to examine the obscene books, where the defendant had conceded that the books were in fact obscene.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate 18 U.S.C. 1462 by importing obscene books into the United States. He was sentenced to imprisonment for 5 years and placed on probation for 4½ years of his sentence (R. 8, 112).[1]

The evidence may be summarized as follows:

In August 1962, John Stamp, a waiter on the *Queen Mary*, was introduced to two persons in a Southampton, England, bookstore by John Monk, a fellow waiter. Stamp agreed to carry some books for them to "Eddie" in New York. On August 16, the day his ship sailed, Monk brought the books aboard. He directed Stamp to place the books in a locker in a New York City subway station at 42nd Street, take the locker key to a specified book store and ask for Eddie. Monk instructed Stamp to tell Eddie that the books were a present from the boys in England and that Monk would see him the next trip (R. 18–23, 32).

[1] "R". refers to the appendix filed by petitioner in the court below.

When Stamp arrived in New York on August 21, he was apprehended by customs agents as he left the boat with the books under his coat (R. 25–26, 41, 51). About 11:00 a.m., the next day, Stamp, cooperating with the agents, deposited the books in the locker at the 42nd Street subway station. Under observation of agents, he went to the Publishers Outlet book store between Eighth Avenue and 42nd Street and asked for Eddie. When petitioner appeared, Stamp said that he had a key for him from the boys in England and that Monk would see him the next trip. Petitioner replied "Okay", and accepted the key (R. 28–29, 43–45, 51–52).

About 2:45 that afternoon, William Pratt removed the books from the locker where they had been deposited. He was followed a short distance by customs agents and was then arrested (R. 47–48, 53). A search of his person revealed two business cards listing telephone numbers for petitioner's unpublished phone number in Yonkers, New York, and the telephone number of the Publishers Outlet (R. 54–57).

At the trial petitioner conceded that the books were obscene (R. 58).

ARGUMENT

I. Petitioner's objections to the admissibility of evidence used to connect him to the conspiracy to import obscene books all lack merit.

a. Testimony of Stamp and the customs agents disclosed that Stamp, after his arrest, in accordance with the illicit agreement, uttered the password and gave petitioner the key to the locker containing the books.

Since Stamp and the agents testified to these facts in court subject to cross-examination, there is no basis for petitioner's objection that the testimony was hearsay. Equally without merit is petitioner's argument that it was improper to connect him to the conspiracy by evidence of his conduct subsequent to Stamp's arrest on the theory that the conspiracy had ended. Relevant acts are admissible to prove a conspiracy even when they occur after the conspiracy has ended. *Lutwak* v. *United States*, 344 U.S. 604. The arrest of Stamp consequently did not immunize petitioner from incriminating conduct and did not bar testimony as to petitioner's subsequent acts. In any event, the withdrawal of Stamp from the conspiracy by his arrest did not terminate the conspiracy. *United States* v. *Cohen*, 197 F. 2d 26, 29 (C.A. 3). There were persons other than Stamp involved with petitioner. Hence the fact that two of the five overt acts charged occurred after the arrest of Stamp is immaterial.[2]

Petitioner himself brought out Stamp's agreement to cooperate with the agents (R. 33). But, in any event, the jury could properly infer from the testimony presented by the government that Stamp cooperated with the agents after his arrest. This fact, generally inferable in any case when an accomplice testifies as a government witness, is usually brought out by an accused to attack credibility. In this case

[2] To the extent that overt act 4 charged a conversation between Stamp and petitioner it may have been technically improper since, while petitioner was acting in furtherance of the conspiracy, Stamp was not. However, the evidence of all the other acts was uncontradicted.

the court cautioned the jury on the use of accomplice testimony (R. 87–88).

b. The business cards containing petitioner's unpublished telephone number and his business telephone number found on William Pratt after he removed the books from the locker were properly received into evidence. Pratt's possession of the locker key shortly after petitioner had obtained it linked the two together, so that the acts and declarations of Pratt in furtherance of the conspiracy would be admissible against petitioner. The fact that Pratt had the telephone numbers was admissible as proof of the conspiracy and of acts in furtherance of the conspiracy. The cards were not post-arrest declarations because they were written and given to Pratt prior to Pratt's arrest. Similarly, since the testimony of Stamp and the customs agents tied petitioner to the conspiracy, the events and conversations in Southampton were admissible into evidence as acts in furtherance of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 74.

2. The issue of whether petitioner was aware that the books were obscene was for the jury to determine. "The circumstances may warrant the inference that he [the accused] was aware of what a book contained, despite his denial". *Smith* v. *California*, 361 U.S. 147, 154. The surreptitious transfer of the books, in which petitioner participated, provided an ample circumstance from which his knowledge of their contents might be inferred.

3. Whether the jury should have been allowed to examine the obscene books after the defense conceded

their obscene character was a matter addressed to the trial judge's discretion. *Parr* v. *United States*, 255 F. 2d 86, 88 (C.A. 5), certiorari denied, 358 U.S. 824. The substitution of an admission for the exhibit might have prevented the jury from accurately appraising all the evidence in the case and understanding the reason that the books were transferred underhandedly. Especially in a case where the question of petitioner's knowledge of the obscene character of the books is a contested issue, it is clearly not an abuse of discretion for the jury to see the material involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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